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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 67.

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

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October 1943.

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BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This case comes to this Court on a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, that Court having entered its Decree for enforcement of the Order of the National Labor Relations Board.

Reference to Official Report of Opinion of Lower Court and Proceedings of the Board.

The opinion of the Circuit Court of Appeals (R. 57-62) is reported in 134 Fed. 2d. 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9-53) are reported in 42 N. L. R. B. No. 27.

JURISDICTION.

The opinion of the Circuit Court of Appeals was filed, and its original judgment of approval with modification entered February 26, 1943 (R. 57-62). The decree of the Circuit Court of Appeals enforcing compliance with the Board order, was entered on March 17, 1943 (R. 62-64). The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act, and the Petition for Writ of Certiorari was granted on June 21, 1943.*

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*, are

"Rights of Employees.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"• • • •

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives

*In the order granting the Writ of Certiorari, this Court requested that the parties in their briefs and arguments deal with the question of mootness.

of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

STATEMENT.

This proceeding involves an order of the National Labor Relations Board directing J. I. Case Company to refrain from giving effect to individual contracts of employment, or entering into any similar form of contract for any period subsequent to the date of the Board's order, and directing the Company to bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., irrespective of the individual contracts.

The case is presented upon an agreed statement of facts (R. 28-53). The facts, insofar as material to the issues presented, are as follows:

J. I. Case Company is engaged in the manufacture and distribution of farm machinery operating plants in Wisconsin, Illinois and Iowa. The plant involved in this proceeding is located at Rock Island, Illinois. This plant was acquired by J. I. Case Company and placed in operation during the year 1937 (R. 30). In the fall of 1940 the Farm Equipment Workers Organizing Committee, C.I.O., instituted representation proceedings before the National Labor Relations Board, and in an election held November 28, 1940, the employees rejected the Union as their bargaining representative (R. 46). Approximately a year later a successor Union, namely, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., instituted similar proceedings before the National Labor Relations Board. As a result of this proceeding, an election was held on February 13, 1942. In this election a majority of the employees in the bargaining unit as found by the National Labor Relations Board, designated the last

mentioned Union for the purpose of collective bargaining (R. 33). No question is presented regarding the representation proceeding or the Certification of Representatives.

Commencing with the acquisition of the plant in 1937, J. I. Case Company had offered annually to each of its employees individually, a contract of employment, and these contracts were executed with each of approximately 75 per cent of the employees. From time to time, at the beginning of each factory year, certain of said contracts were renewed, and certain new contracts entered into. The employees executing said contracts were not necessarily the same from time to time. Certain employees executed said contracts who had not executed them during the preceding factory year, and other employees who had previously executed contracts failed to renew them. However, the percentage of contracts in effect at all times remained as above set forth. The factory year involved in this case commenced August 1, 1941, and ended July 31, 1942, and there were in effect at the time of the representation proceeding, (February 1942) 433 of such contracts of which 415 were with employees in the bargaining unit consisting of 582 employees (R. 31). The stipulation (R. 32) states:

> *"For the purposes of this stiplation the Board does not contend that the execution of said contracts was a condition of employment or that the status of individual employees was affected by reason of signing or failing to sign said contracts."* (Italics supplied.)

After the certification of the Union as collective bargaining representative, the Union requested the Works Manager at the Rock Island plant to bargain collectively with it regarding the rates of pay, wages, hours of employment, and other conditions of employment as the exclusive representative of all employees in the bargaining unit and submitted a proposed form of collective agreement. The Works Manager, in response to the Union's request, advised the Union that the Company would not deal with it in any

manner affecting the rights and obligations of the Company and its employees under the individual contracts while the contracts remained in full force and effect. He further advised the Union that the Company would deal with it on matters which did not affect the rights of the Company and the employees under the individual contracts, and upon the expiration of the individual contracts it would deal with the Union as the exclusive bargaining agency for all employees in the bargaining unit (R. 33).

The unfair labor practice charged to respondent in connection with its refusal to bargain collectively, arose out of a communication by the Company to its employees reporting to them what had taken place between the Company and the Union representatives. This letter to the employees was dated March 19, 1942, and contained the following provision quoted by the Court in its opinion (R. 58):

> "The Union has advised the Company that it will not deal with the Company except on the basis of the contract which it presented. In other words, the Union has taken the position that the Company must tear up its contracts with its individual employees and disregard the rights and obligations of its employees and of itself under those agreements. The Company believes and has been advised that the contracts for their term constitute legal and binding obligations both on the part of the Company and on the part of the employees, and that its individual employees have constitutional rights which they are entitled to have preserved and which the Company has no right to surrender."

On March 27, 1942, charges were filed with the National Labor Relations Board (R. 1-2), and on April 15, 1942, the Board issued its amended complaint (R. 2-5). The answer was filed on April 16, 1942, (R. 6-9), and on July 7, 1942, the National Labor Relations Board issued its decision and order (R. 9-56). The order directed J. I. Case Company to cease and desist from (a) giving effect to the individual contracts of employment, or entering into any similar form of contract with its employees for any period subsequent to

the date of the Board's decision, (b) refusing to bargain collectively with the Union, and (c) in any manner interfering with, restraining or coercing its employees in the exercise of their rights under the National Labor Relations Act (R. 25-26).

The Board also ordered the Company to take the following affirmative action (a) give separate written notice to each of its employees who had signed an individual contract, that the contract would not be enforced or attempted to be enforced, but that the discontinuance of the contract was without prejudice to the assertion by the employee of any right which he may have acquired thereunder, (b) upon request, to bargain collectively with the Union, (c) to post in conspicuous places in its Rock Island plant, and maintain such posting for a period of sixty days, appropriate statements of its compliance with the order, and (d) to give the usual notice to the Board of its compliance (R. 26-27).

The Court below sustained the order of the Board in all respects, with the exception of a modification of the provision enjoining in general terms the violation of the National Labor Relations Act.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred—

(1) In depriving petitioner of its rights under the Fifth Amendment to the Constitution of the United States to make individual contracts of employment with employees so desiring to contract.

(2) In affirming and approving the power and authority of the National Labor Relations Board to invalidate individual contracts valid in their terms and inception, and to perpetually enjoin the making of such contracts.

(3) In approving the order of the National Labor Relations Board that the assertion by petitioner of the continuing effectiveness of individual contracts of employment,

valid in their terms and inception, constituted an unfair labor practice within the provisions of the National Labor Relations Act.

(4) In depriving petitioner of its constitutional right of free speech to report correctly to its employees the proceedings between the Company and the Union representatives.

SUMMARY OF ARGUMENT.

1. The National Labor Relations Act does not forbid individual contracts of employment and the National Labor Relations Board is without authority to invalidate individual contracts of employment which are valid in their terms and inception and which were entered into prior to the selection of the collective bargaining representative.

2. The selection of a collective bargaining representative does not operate to supersede valid individual contracts of employment. Any such construction of the National Labor Relations Act is unwarranted by the provisions of the Act and calls into question its constitutionality.

3. The assertion by petitioner of the validity and continuing effectiveness of valid individual contracts of employment is not an unfair labor practice. Petitioner did not challenge the authority of the collective bargaining representative to deal in any manner consistent with petitioner's rights and obligations under the individual contracts.

4. The action of petitioner in correctly reporting to its employees negotiations between itself and the Union was within petitioner's constitutional right of free speech.

5. The National Labor Relations Board is without authority to perpetually enjoin the making of valid individual contracts of employment. A construction of the National Labor Relations Act which destroys the right of individual contract where collective bargaining representa-

tives have been certified is contrary to the decisions of this Court and renders the Act unconstitutional. The perpetual injunction bears no reasonable relation to the unfair labor practice found by the Board and is punitive rather than remedial.

6. Insofar as the Order of the National Labor Relations Board relates to the specific individual contracts which expired as of July 31, 1942 (prior to the enforcement proceedings in the Circuit Court of Appeals), it would appear that the issue became moot and Petitioner so advised the Circuit Court of Appeals and agrees with the position now taken by the Counsel for the National Labor Relations Board.

7. The Order of the Board perpetually enjoining petitioner from entering into individual contracts of employment is of a continuing nature involving substantive rights and is not moot.

8. The circumstances which raise the question of mootness were in existence at the time of the proceedings before the Circuit Court of Appeals and that Court was advised with respect thereto. In the event this Court should determine that the issues are moot the Decree of the Circuit Court should be reversed and the mandate direct that the Petition for Enforcement of the Board's Order be dismissed.

ARGUMENT.

Petitioner submits that the decision of the Circuit Court of Appeals is contrary to and conflicts with the decision of this Court in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The Circuit Court of Appeals held that the *Jones & Laughlin* case was no longer authoritative on the question involved here, but was impaired, if not overruled, by other decisions of this Court. (R. 59).

The Circuit Court of Appeals stated in its opinion (R. 59):

> "Thus our rather narrow question is whether existing individual agreements with employees must yield to and be subordinate to the duty of the employer to bargain collectively with the Union as the exclusive agency, designated by law."

The Supreme Court of the United States has dealt with the validity of individual contracts which were the fruits of an unfair labor practice and which contained provisions repugnant to the Act. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. *National Labor Relations Board* v. *Stone*, 125 Fed. 2d, 752. (Cert. denied October 12, 1942, Case No. 200).

This is the first occasion that there has been presented to this Court the question of the continuing effectiveness of an individual contract between an employer and an employee where the contract is concededly valid in its terms and inception.

I.

The National Labor Relations Board Was Without Authority to Invalidate the Individual Contracts of Employment and to Enjoin Petitioner in Perpetuity from Entering Into Individual Contracts With Its Employees.

The National Labor Relations Act does not forbid individual contracts of employment. In the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court held that an individual contract between an employer and an employee is sanctioned and is not forbidden by any provisions of the National Labor Relations Act. This Court in its opinion, interpreting the appropriate Section of the National Labor Relations Act, makes the following statement (pp. 44-45):

> "* * * The provisions of section 9(a) that representatives, for the purpose of collective bargaining, of the

majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in section 2, Ninth, of the Railway Labor Act, as amended (45 U. S. C. A. Sec. 152, subd. 9), which was under consideration in Virginian Railway Co. v. System Federation No. 40, supra. The decree which we affirmed in that case required the railway company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with any one other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with any one purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts, generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees'. We think this construction also applies to section 9(a) of the National Labor Relations Act (29 U. S. C. A. Sec. 159(a)).

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'."

It is clear from the decision of the Court—

(1) The obligation of the employer is to deal with no other *collective* bargaining representative than the one

chosen under the provisions of the Act; (2) the collective representative so chosen is the agent of all the employees in the appropriate unit for purposes of *collective* bargaining, and (3) the selection of the agent does not destroy the right of the individual principal voluntarily to execute his *individual* contract of employment.

The Circuit Court of Appeals, in its opinion, indicates that the language quoted has been rejected in subsequent opinions of the Court, or that at any rate this Court did not mean what it said in the *Jones & Laughlin* case. We have searched the decisions of this Court in vain for any statement expressly overruling or modifying the above quoted provision. We are likewise unable to find any language of this Court which by implication modifies or overrules the opinion. The only case to which the Circuit Court of Appeals makes reference in support of its statement is the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. There is no reference in that decision to the *Jones & Laughlin* case. The facts in the *National Licorice* case are entirely different. The Court was there dealing with a contract which had been found to be the fruit of an unfair labor practice forbidden by the National Labor Relations Act, and containing provisions repugnant to the Act. There is no such finding or determination in the case at bar,—in fact, the finding and determination is to the contrary.

We submit, therefore, that the decision in the *Jones & Laughlin* case remains and is effective and controlling upon the case at bar, and that the power delegated to the National Labor Relations Board pertains only to contracts repugnant to the Act or resulting from a violation of the Act.

The National Labor Relations Act was addressed to a situation existing where the employer declined to deal collectively with his employees. The preamble to the National Labor Relations Act refers to this circumstance and its resulting labor disputes, and the declared purpose of the Act

is to eliminate those disputes, by preventing the employer from creating them in the manner indicated and thus to protect the right of employees to bargain collectively, but not to require them to do so. It does not follow that the employee who wishes to deal individually may not do so, nor that, having so dealt, his contract does not have the full force and effect of any other contract, assuming, of course, that it is not otherwise objectionable. Any intent on the part of Congress to destroy this long existing right should be expressed in clear and unmistakable terms and not left to construction. It was with these rights and with this interpretation that Mr. Chief Justice Hughes was dealing in the opinion in the *Jones & Laughlin* case, and his decision was obviously predicated upon the well-established constitutional principles of freedom of contract.

It is apparent from the language of the Court in the *Jones & Laughlin* case that the Court was seeking an interpretation which would not interfere with the liberty of contract of the individual guaranteed by the Constitution and forming the basis of a long line of decisions of the courts. In reaching its conclusions the Court did not overrule in principle any one of these decisions, but held them inapplicable in view of the construction it placed upon the Act (301 U. S. 1, 45). It is apparent that if the Court had felt the Act necessitated a construction interfering with freedom of contract a different conclusion would have been reached on the constitutional question involved.

That the right to freedom of contract is not absolute but may be limited and regulated in the public interest in accordance with necessity and within constitutional limits, is, of course, well settled. But as this Court has many times pointed out, freedom of contract is the rule and restraint is the exception. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

Legislatures have from time to time enacted regulations with respect to the legitimate subject matter of contracts. However, such regulation is an entirely different matter

from the complete destruction of the right of individuals, admittedly legally competent, to contract concerning their affairs.

There are many classes of persons who are treated as wards of government, or as the subject of peculiar protection. For example, limitations upon the right of contract are recognized in the case of infants and insane persons. In the instant case, however, we are dealing with persons who are in no sense declared by statute to be incompetent to manage their own affairs and make contracts with respect thereto. The position of the National Labor Relations Board is that the individuals whose contracts are here under consideration are fully competent to select collective bargaining agents and to contract through them with respect to wages, hours, and conditions of employment, but that the same individuals are prohibited from entering into voluntary individual contracts of employment directly with their employer.

There is no language in the National Labor Relations Act conferring power upon the Board to so construe the Act. It is one thing to modify, limit, or regulate contracts where they deal with a forbidden subject matter or contain provisions opposed to public policy, but it is quite a different thing to deprive an American citizen, whether employee or employer, entirely of his right and freedom to make a contract, as is done by the perpetual injunction issued in this case. Such perpetual injunction is not remedial in character, but is clearly punitive in that it bears no reasonable relation to the unfair labor practice allegedly involved. It is therefore not warranted by the provisions of the National Labor Relations Act. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7.

The Circuit Court of Appeals adverts to the principle that all contracts must be assumed to be entered into with reference to the possible subsequent exercise of governmental authority, and hence concludes that the individual contracts of employment under consideration here were subject to

abrogation at any time a majority of the employees determined to bargain collectively. This conclusion was qualified both by the National Labor Relations Board and the Circuit Court of Appeals in one important respect. The contracts and the rights thereunder were upheld as to the individual employees who were parties to them but were denied as to the employer who was the other party to the same contracts. Thus, we submit, an anomalous situation is created whereby contracts admittedly valid in their inception, are left bindng upon one of the contracting parties, while the other contracting party is absolved from performance. The answer attempted by the Board and the Court is that this result is in the nature of a penalty imposed upon the employer for having mistakenly asserted the continuing validity and effectiveness of the contracts. That is to say, if the view of the Board and the Circuit Court of Appeals be sustained, if the employer had remained silent and disregarded the individual contracts, the contracts would have remained valid and enforceable as to both the employer and the employee. But because the employer communicated to the employees his view as to the legal effect of the certification by the National Labor Relations Board, the Board claimed authority under the *remedial* provisions of the National Labor Relations Act, to *penalize* the employer by holding that he could no longer assert any rights under the contracts but that his obligations under such contracts were still in full force and effect at the option of the other parties to the contracts.

If the reasoning of the Circuit Court of Appeals is to be sustained, either both parties to an individual contract of employment must be similarly affected by the selection of collective representatives, or neither of them should be—that is to say, it can not fairly be held that the employer must proceed to bargain collectively on all subjects and contract in a way which may conceivably violate his obligation to individual employees within the bargaining unit, and thereby confer upon them a right of action for breach of

contract which he himself is powerless to prevent without running the risk of being in violation of the National Labor Relations Act.

Of course, in order to reach this result it is necessary to declare that when representatives are selected for the purposes of collective bargaining, all previous agreements between the employer and the individual employee, or between the employer and other groups of employees within the same bargaining unit, are at once superseded and abrogated.* We submit that no such construction is authorized by the National Labor Relations Act.

The construction adopted by the Board and the Circuit Court of Appeals presents an interesting and important question in the field of contract law. The National Labor Relations Act was drafted on the theory that the collective bargaining representative is, as implied by the term, the agent of the employees for the purpose of collective bargaining. The employees are the principals. The principals here, or a substantial number of them, have executed valid individual contracts of employment. It is difficult to find any support in the principles of contract law for the proposition that they may avoid the obligations of their individual contracts of employment by selecting an agent for carrying on collective bargaining.

* 415 individual contracts of employment were in effect with employees in the bargaining unit of 582 employees at the time of the ballot (R. 13). 352 employees voted to select the Union as collective bargaining representative and 190 employees signified their desire not to be represented by the Union for the purpose of collective bargaining (R. 51). It is accordingly clear that all the employees having individual contracts could not have voted for collective representation and that a number of employees preferred to assert their individual contracts of employment.

II.

The Assertion by Petitioner of the Validity and Continuing Effectiveness of Individual Contracts of Employment Was Not An Unfair Labor Practice and Such Assertion, Together With Correctly Reporting to Employees Negotiations Between the Union and the Petitioner, Was Within Petitioner's Constitutional Right of Free Speech.

There is, of course, no question presented in the event petitioner was correct in its conclusion regarding the continuing effectiveness of the individual contracts of employment. This is recognized in the decision of the Circuit Court of Appeals. That Court was of the opinion that petitioner, by advising the employees that the individual contracts were still in force, committed an unfair labor practice. We do not believe that this conclusion is warranted. Petitioner cannot be said to have boldly stepped forward and asserted an interpretation of the National Labor Relations Act unsupported by authority. In fact, petitioner believed then and believes now that its interpretation was fully supported by the authority of the Supreme Court of the United States. It is difficult to see how petitioner's letter of March 19th reporting correctly the proceedings between it and the Union representatives could have affected the right of its employees to join or form a labor organization of their own choosing, inasmuch as at that time the election had taken place and a certification of the Union as collective bargaining representative had been issued by the National Labor Relations Board. This Court has zealously protected in the public interest the preservation of the right of free speech in labor matters. *Thornhill* v. *Alabama*, 310 U. S. 88.

We submit that regardless of the determination with respect to the effect of the certification of the collective bargaining representative on the individual contracts the report which petitioner made to its employees was within the constitutional guaranty and protected by the First Amend-

ment, and can not therefore be regarded as a violation of Section 8(1) of the National Labor Relations Act.

III.

Are the Issues Moot?

In its Order granting the Petition for the Writ of Certiorari, the Court requested that the parties discuss in their briefs the question of the mootness of the issues.

The Order of the National Labor Relations Board as affirmed by the Circuit Court of Appeals (R. 62-64) required Petitioner to cease and desist from

(1) *Giving Effect to the Individual Contracts of Employment.*

In its Brief before the Circuit Court of Appeals, Petitioner directed the Court's attention to the fact that the individual contracts referred to had expired on July 31, 1942, and had not been renewed or extended;

(2) *Refusing to Bargain Collectively with the Union in Respect of Rates of Pay, Wages, Hours of Employment and Other Terms and Conditions of Employment.*

Petitioner in its Brief in the Circuit Court of Appeals, directed attention to the fact that it was dealing with the Union and had dealt with the Union since July, 1942, as the exclusive collective bargaining representative of the employees in the bargaining unit and that at that same time certain issues, including wages, were before the National War Labor Board. At the present time there is in effect between the Company and the Union, an agreement arrived at through the process of collective bargaining, with the exception of certain provisions incorporated pursuant to Directive Order of the National War Labor Board.

The affirmative action required by the terms of the Board's Order as affirmed by the Court, related directly

to the two provisions of the Board's Order referred to above.

As Petitioner stated in its Reply Brief to the Brief filed by the Board in Opposition to the Petition for Writ of Certiorari (page 7), Counsel for the Board vigorously contended in the Circuit Court of Appeals that the foregoing circumstances did not render the issue moot, and no reference to this question appears in the decision of the Circuit Court of Appeals, and we call attention to the fact that the Board did not, in its Brief in opposition to the granting of the Writ of Certiorari, take the position that the issues were moot. It asserted merely that the issues were academic, *i.e.*, were of no "present practical importance".

In its Brief in Opposition to the granting of the Petition for Writ of Certiorari, the Board states:

> "Apart from the merits of the question, however, there is no occasion at the present time for a review of the provision of the Board's order requiring the cancellation of the contracts. Most of these contracts expired July 31, 1942 (R. 31) and we are advised that since the entry of the Order, petitioner has, pursuant to an order of the National War Labor Board, entered into a collective bargaining agreement superseding the individual contracts. Although this would not render the point moot, it deprives the issue as to the validity of the Board's order requiring the abrogation of the original individual contracts of present practical importance."

The record in the case itself is silent with respect to the proceedings before the National War Labor Board. However, since the proceeding has been adverted to by both parties, attention is directed to an error in the assumption of the Board in the above quotation. The Company at no time abandoned its position with respect to the continuing effect of the individual contracts of employment up to their expiration date of July 31, 1942; and the collective bargaining

contract entered into with the Union became effective after that date.*

The principles applicable to determination of the issue of mootness are clearly established by the decisions of this Court.

It is well settled that the Court will not pass on any proceeding which does not constitute a case or controversy, and that a settlement between the parties will terminate a controversy where private rights only are involved. Where, however, the controversy involves public rights, the determination of the issues is not affected by changes in circumstances due to lapse of time which would render the issue moot where private rights only were involved. *U. S.* v.

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*The actual statement regarding individual contracts made by the Company in its acceptance of the Directive Order of the National War Labor Board in its letter of August 3rd, 1942, referred to by the Board in the footnote on page 11 of its Brief, is as follows:

"INDIVIDUAL CONTRACTS

"The Company will discontinue the practice of obtaining individaul contracts.

"The report of the Panel, as adopted by the Board, stated—

'In discussing the grievance procedure the Panel has already said that it finds no necessity for including in this agreement a clause preserving to the individual the rights which he has to present grievances to the Company individually. In the same manner the Panel sees no necessity of setting forth in this contract the fact that nothing herein contained shall interfere with the right of an individual not a member of the Union to deal with the Company individually. Rights an individual may have to so deal exist and will continue to exist independently of this contract.'

"The Company has agreed to forego its constitutional right to obtain individual contracts. The Company, of course, cannot waive on behalf of any individual employee, nor should it disregard any constitutional right which the individual employee may have to make his individual contract with the Company."

The Company's acceptance was given under protest and was expressly limited to the duration of the war emergency by the terms of the letter to the National War Labor Board, above quoted.

Trans-Missouri Freight Assn., 166 U. S. 290; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, E. H. Young* v. *Interstate Commerce Commission*, 219 U. S. 498; *Willing et al.* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 289; *County of Dakota* v. *Glidden*, 113 U. S. 222; *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113; *U. S.* v. *Hamburg-American Steamship Co.*, 239 U. S. 466; and *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308.

This Court has uniformly held that decisions of administrative and quasi-judicial tribunals present issues affecting public policy as declared by Congress, and that the issues involved do not become moot by change in circumstances due to lapse of time or even by compliance with the order. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and E. H. Young*, 219 U. S. 498; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257.

The same principles have been applied by this Court to decisions of the National Labor Relations Board. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, at page 271:

> "* * * Respondents suggest that the case has become moot by reason of the fact that since the Board made its Order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania Company for purposes of collective bargaining and that in a pending proceeding under section 9(c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania Company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

On the facts in this case it is probably true that insofar as the individual contracts to which specific reference is

made in the Order of the Board and Decree of the Circuit Court of Appeals are concerned, there is no practical importance involved in considering the rights of the employees and the affirmative action required regarding the contracts which expired July 31, 1942. Counsel for Petitioner expressed this view in the Circuit Court of Appeals and this view is now apparently concurred in by the attorneys for the Board.

The Board's Order as affirmed by the Circuit Court of Appeals, enjoins Petitioner in perpetuity from entering into individual contracts of employment. With respect to this portion of the Order of the Board, Petitioner in its Brief in the Circuit Court of Appeals stated its position to be (pp. 6 and 7):

> "Respondent asserts and has asserted its right to enter into individual contracts of employment with employees desiring to make such contracts, where such contracts are not a condition of employment and are freely and voluntarily entered into by the employee, and do not contain provisions repugnant to the National Labor Relations Act, and are not entered into for the purpose of interfering with, restraining or coercing its employees in the exercise of their rights under the Act."

Counsel for the Board, on page 10 of its Brief filed in Opposition to the Petition for Writ of Certiorari, makes the following statement:

> "The prohibition against entering into similar forms of contracts in the future, though broadly phrased, was intended only to preclude petitioner from deriving any benefits from the contracts thus utilized and from utilizing similar contracts under similar circumstances in the future, not to prevent petitioner from lawfully contracting with employees individually, under circumstances which negative any intent to interfere with their rights."

If, by this statement, Counsel for the Board intend to concur in the assertion made by Petitioner regarding the right

of individual contract in the future, then we must agree that the case has become one for appropriate amendment of the Decree of the Circuit Court of Appeals rather than a controversy requiring determination by this Court.

If, on the other hand, the Board by its statement contends that the assertion by Petitioner of the continuing validity and effectiveness of the individual contracts of employment would constitute an unfair labor practice within the provisions of the National Labor Relatons Act, then it is submitted that a controversy is presented for the consideration of this Court and that the issue with respect thereto is neither moot nor abstract.

If the National Labor Relations Board is correct in its apparent position that the issues herein are of no "present practical importance" and have thus become moot, it is equally true that such condition existed when the matter was before the Circuit Court of Appeals, and that Court should not have entertained jurisdiction of the Petition for Enforcement; and its Decree should be reversed and set aside. *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S. 300, 302; *U. S.* v. *Hamburg-American Steamship Co.*, 239 U. S. 466, 477, 478; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218, 219; *Heitmuller* v. *Stokes*, 256 U. S. 359, 362.

CONCLUSION.

In conclusion, we submit that the opinion of this Court in the *Jones & Laughlin* case remains unreversed and unmodified and that the Circuit Court of Appeals was in error in holding otherwise. Any other conclusion presents an important question for the reconsideration of this Court as to the constitutionality of the National Labor Relations Act itself. In the *Jones & Laughlin* case this Court reviewed the various substantial grounds which were urged upon it in support of the view that the statute was unconstitutional. One of those grounds was that the statute necessarily destroyed individual contract rights and thus was in conflict

with the Fifth Amendment to the Constitution of the United States. This Court upheld the constitutionality of the National Labor Relations Act and one of the express grounds on which it did so was its conclusion that the statute did not by its terms impair the right of individual contract or authorize the National Labor Relations Board to do so. If it now be held that the statute *does* impair or destroy these basic constitutional rights or *does* authorize the National Labor Relations Board to accomplish that result, then, we submit, the validity of the National Labor Relations Act is again drawn in question and should be determined by the Court in the light of this new construction.

Respectfully submitted,

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